UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

LUCHT'S CONCRETE PUMPING, INC

Employer,

and CASE 27-RC-8414

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 9

Petitioner.

REGIONAL DIRECTOR'S REPORT ON OBJECTION AND RECOMMENDATION TO OVERRULE THE OBJECTION

This report contains my findings regarding the Petitioner's Objection to Conduct Affecting the Results[1] of the Election[2] (Objection) conducted on December 14, 2005, among the employees in the Stipulated Unit[3]. The Petitioner filed its timely Objection on December 20, 2005, a copy of which was served on the Employer and a copy of which is attached hereto as Exhibit 1.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, after reasonable notice to all parties to present relevant evidence, the undersigned conducted an investigation of the

[1] The Tally of Ballots shows that there were approximately 35 eligible voters. Five ballots were cast in favor of the Petitioner and 29 ballots were cast against the Petitioner. There were no challenged ballots and no void ballots.

[2] The election was conducted pursuant to a petition filed on October 11, 2005. After several re-scheduled hearing dates, the parties executed a Stipulated Election Agreement that was approved on November 2, 2005. The payroll eligibility date for the election was October 29, 2005.

[3] The stipulated unit included all full time concrete pump operators and mechanics employed by the Employer at its Denver CO, Ft. Collins CO, Longmont CO, Colorado Springs CO and Cheyenne WY facilities, but excluding all office and clerical employees, salesmen, dispatchers, guards and supervisors as defined in the Act and all other employees.

Objection, has carefully considered the relevant evidence, and hereby issues this Report on the Objection.

THE OBJECTION[4]

The Petitioner asserts that employee John Roadcap, "a known opponent of the Union", engaged in unlawful electioneering by holding a barbecue for the voters at the Employer's Longmont Colorado facility, one of four locations where this election was conducted. The Petitioner asserts in its Objection that the purpose of the barbecue "was to influence employees to reject the Union" and that the barbecue "disrupted the neutral atmosphere that was to exist at the polling location and was conduct that materially affected the election."

The polling place at the Employer's Longmont facility was located in a building attached to the truck bay containing a small office, a reception area, a sales office and a restroom. The voting booth was set up in the small office and during the actual voting period the Board Agent and the Employer's observer[5] sat directly outside this office at a table set up in the hallway. The polling period ran from 5:30 p.m. to 8:00 p.m. At the Longmont facility there were two ways to access the office where the voting booth was set up: through the front door of the facility or through the truck bay. To access this office through the front door, a voter would walk through that door, turn left, and walk approximately 15 feet down a hallway, past the time clocks, to the table where the Board Agent and the Employer's observer were sitting outside of the office containing the voting booth. To access the polling area through the truck bay, a voter would walk through the

[4] Although the Petitioner's Objection contains five separate paragraphs, each paragraph relates to the one incident discussed in this Report on Objection.

truck bay itself, past a partition, into a hallway and through two doors before arriving at the table where the Board Agent and the Employer's observer were seated. Both doors in this hallway were open during the polling period. The truck bay itself is a large area, big enough to hold 4-5 pumping trucks.

Although the Petitioner's International Representative Mr. Lingerfelt testified that it "seemed to [him] that the barbecue was not something that had been done before on a regular basis", according to the evidence the Employer's employees have in the past held barbecues utilizing the Employer's premises for this purpose. Specifically, employees are permitted to use the Employer's facilities for lunches, barbecues or other social events without obtaining permission to do so from any supervisor or other Employer representative. Employees have held barbecues in the past at least at the Employer's Longmont and Ft. Collins Colorado facilities. On some past occasions, supervisors and other Employer representatives have been invited to these social events.

Concrete Pumping Operator John Roadcap held a barbecue for employees at the Employer's Longmont facility on December 14, 2005, the date of the election. There is no evidence that the Employer had any knowledge that the Longmont barbecue was taking place on December 14, 2005, but even assuming that it had been aware, the barbecue itself was not an unusual event. Mr. Roadcap arrived at the Longmont facility with a grill, charcoal and food that he had purchased for a barbecue on December 14, 2005 between about 5:00

[5] The Petitioner did not have an observer at the election.

p.m. and 5:15 p.m., while the pre-election conference was being conducted. [6] He went past the voting area and into the shop. He and another employee set up the grill outside the building and began cooking the food. The other employees[7] arrived at the facility between 5:30 p.m. and 6:00 p.m., after they had finished their work for the day. The great majority of these employees voted at the beginning of the polling period. While they were waiting for the food to cook and then eating, the operators congregated near a desk in the shop. Witnesses estimated that these employees were between 25-40 feet from the office where the voting both was located. According to the evidence, these employees could not see into the voting area and voters could not see the area where the operators were congregating for the barbecue. Mr. Roadcap was the last voter to vote at the Longmont facility and he voted at approximately 6:30 p.m. When he went in to vote, he asked the Employer's observer and the Board Agent if they wanted some barbecue. Both declined his offer. Mr. Roadcap was the last operator to leave the shop area at about 7:30 p.m. after he had cleaned up from the barbecue.

No supervisors or agents of the Employer were invited to this barbecue. In fact no supervisor or management representative was present at the Longmont facility while the election was being conducted. Mr. Roadcap is not an agent or supervisor of the Employer and voted in the instant election without challenge. There is no evidence that Mr. Roadcap consulted with, or otherwise

[6]The Board Agent held a pre-election conference with the Petitioner's Representative and the Employer's observer. Mr. Roadcap did not participate in the pre-election conference, held near the voting booth, but both the Petitioner's representative and the Employer's observer testified that Roadcap arrived during that time.

[7] There were thirteen employee names on the voting list for the Longmont facility.

advised, any Employer representative that he was going to be holding a barbecue in the shop on the date of the election. There is no evidence that any electioneering occurred in the area where the operators congregated for the barbecue or near the designated polling area. In fact, according to all but one witness, employees at the barbecue did not mention the election. The one witness stated that employees only reminded each other to vote but did not mention how to vote.

The Petitioner contends that Mr. Roadcap interfered with employee free choice because he set up the barbecue and provided barbecue food to employees as they went in to vote in the election in order to influence their vote in the election. According to the Petitioner, Mr. Roadcap's actions constituted electioneering in order to get employees to reject the Union and materially affected the election results.

I find, for the reasons discussed below, that the conduct alleged as objectionable does not provide a basis for setting aside the election in this case. First, there is no evidence that any "electioneering" took place "at or near the polls". According to most witnesses the employees at the barbecue did not even mention the election during the barbecue. The one witness who testified that they mentioned the election stated that employees only reminded each other to vote in the election and did not talk about how to vote. Moreover, the evidence established that the area in the shop where employees held their barbecue cannot be considered "at or near the polls" and was never designated as a "no-electioneering" area. Therefore, even if the employees had discussed the

election during the barbecue those discussions would not constitute objectionable conduct. See *Bally's Park Place, Inc.*, 265 NLRB 703 (1982), citing *Milchem, Inc.*, 170 NLRB 362 (1968).

Second, even assuming for purposes of argument that some electioneering did occur during the barbecue, there is no evidence that Mr. Roadcap is a supervisor or agent of Respondent, and therefore the Board's standards governing objectionable conduct by third parties apply to these events. In regulating election conduct, the Board has long distinguished between conduct by the parties to the election and conduct by employees who are third parties. The Board will set aside an election in cases in which a party's agent commits challenged conduct, where that conduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. See *Robert Orr-Sysco Food Services*, 338 LRB 614,615 (2002) (citing *Baja's Place*, 268 NLRB 868(1984)). In contrast where it is a non-agent employee who commits challenged conduct, the Board will set aside the election only if the third-party conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. See *Robert Orr-Sysco Food Services*, 338 NLRB at 615; *Associated Rubber Co.,* 332 NLRB 1588 (2000); *Cal West Periodicals, Inc.*, 330 NLRB 599, 600 (2000); *Westwood Horizon Hotel*, 270 NLRB 802 (1984). In the instant case, as discussed above, there is no evidence that the barbecue that is the subject of the Petitioner's Objection created a general atmosphere of fear and reprisal that the Board requires to find that a fair election was impossible.

To set aside an election based on third-party conduct, the Board requires a more rigorous showing because the conduct of third parties tends to have less effect upon voters than similar conduct by the employer who has control, or the union which seeks control, over the employee's working conditions. See *Cal-West Periodical*, 330 NLRB at 600; *Orleans Manufacturing Co.,* 120 NLRB 630 (1958). An employer and a union are deterred from election misconduct by the Act's unfair labor practice provisions and the trouble and expense of going through a rerun election. Third parties do not face those restrictions. *Id*. If the Board were to give the same weight to third-party conduct as to conduct by the parties and their agents, it would diminish the likelihood of getting quick and conclusive election results. *Id*. In the facts of this case I find there is insufficient evidence that Mr. Roadcap's conduct as a third party was so aggravated as to render a fair election impossible.

Finally I find that Mr. Roadcap was not an agent of the Employer as regards the complained-of conduct. There is no dispute that at the time of the barbecue on December 14, 2005 Mr. Roadcap was a concrete pump operator who was named on the *Excelsior* list and was eligible to vote in the election. Ordinarily parties to an election are not responsible for the conduct of such individuals. It is well established that, under Section 2(13) of the Act, employers are responsible for the acts of their agents in accordance with ordinary common law rules of agency. See *Town & Country Supermarkets*, 340 NLRB 1410, 1416 (2004). Board law establishes that an employer can be responsible for the conduct of a rank and file employee if the employer knew about the employee's

conduct but failed to disavow it or disassociate itself from that conduct or where the attitude or acts of the employer appear to endorse such conduct. See *K. B. Specialty Foods Co*., 339 NLRB 740,749(2003); *Dal-Tex Optical Co., Inc.,* 130 NLRB 1313, 1321(1961). In the instant case, the Petitioner presented no evidence that the Employer knew that Mr. Roadcap was going to hold a barbecue on the date of the election and no evidence that the Employer endorsed such conduct. In summary, the Petitioner has presented no evidence that Mr. Roadcap was an agent of Respondent or that the Employer was somehow responsible for his conduct. The burden of proving an agency relationship is on the party asserting its existence. See *Tyson Fresh Meats, Inc.,* 343 NLRB No. 129, slip op. at 2 (2004).

CONCLUSION

On the basis of the foregoing it is the conclusion and the recommendation of the undersigned that the Petitioner's Objection[8] should be overruled in its entirety and that a Certification of Results should issue[9].

[8] In its supporting evidence for the Objection, the Petitioner noted that the Employer had permitted Mr. Roadcap to appeal to employees at an Employer safety meeting both to solicit employees to disavow the Union and to allow him to act as the employees' representative instead of the Petitioner. It is clear from the Petitioner's submissions that it offered this information for the limited purpose of establishing that Mr. Roadcap was arguably closely aligned with management in the eyes of employees and that employees therefore would have viewed the barbecue not as Mr. Roadcap's gathering but as the Employer's gathering. To the extent that this conduct could have been alleged as objectionable in and of itself, the Petitioner failed to timely file such an Objection allegation and therefore that issue is not properly before the undersigned. See *John W. Galbreath & Company*, 288 NLRB 876 (1988) and *Burns International Security Services, Inc*., 256 NLRB 959 (1981). Under the rule in these cases, a Regional Director may set aside an election on the basis of objectionable conduct discovered in the course of an investigation of a party's timely filed Objections. However, if the evidence of the misconduct that is unrelated to the timely filed Objections is discovered at the initiative of the objecting party, the Regional Director should not consider that evidence as a basis for setting aside the election unless the objecting party has provided clear and convincing proof that the evidence was "not only newly discovered, but also previously unavailable" *Burns Security Service*, supra at 960. In the instant case evidence of the alleged misconduct unrelated to the timely filed Objection was in fact, discovered at the initiative of the Objecting party, but no timely allegation was filed. Moreover, the evidence concerning Mr. Roadcap's appeal at the safety meeting was neither newly discovered nor

Dated at Denver, Colorado this 07th day of February 2006.

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previously unavailable. Since this evidence is unrelated to the timely filed Objection, and in accordance with established Board law and policy, I shall treat it as an untimely filed Objection and not consider it as a basis for setting aside this election.

[9] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC. Exceptions must be received by February 21, 2006. Pursuant to Section 102.69 (g), documentary evidence, including affidavits that a party has timely submitted to the Regional Director in support of its objections and that are not included in this Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto that a party filed with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.